(2) 95-1834

Supreme Court, U.S.
FILED
JUL 18 1996
CLERK

No. 95-184

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DAVID FRIEDLINE,

Petitioner,

v.

NEW HAMPSHIRE DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF CHILD SUPPORT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

THE STATE OF NEW HAMPSHIRE
JEFFREY R. HOWARD
Attorney General
STEPHEN J. JUDGE*
Senior Assistant Attorney General
JENNIFER BROOKS GAVILONDO
Attorney
CIVIL BUREAU
New Hampshire Dept. of Justice
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3658

Attorneys for Respondent
** Counsel of Record*

July 18, 1996

40 pp

RESTATED QUESTION PRESENTED

Must a defendant in a civil contempt proceeding for non-payment of child support faced with incarceration, who is not indigent, be provided with court-appointed legal counsel?

TABLE OF CONTENTS

Page

RESTATED QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 4

I. Petitioner's Question Presented Is Improper For The Facts Of This Case. 4

II. The Decision Of The New Hampshire Supreme Court Is Correct And Does Not Conflict With The Decisions Of This Court. 6

A. The *Lassiter* "Presumption" Is Dicta And Not Precedential. 6

B. New Hampshire Case Law And The Decision In This Case Do Not Conflict With *Lassiter*. 8

III. The New Hampshire Supreme Court's Decision Does Not Reveal A Split In The Circuits. 9

IV. The New Hampshire Supreme Court's Decision Is Consistent With A Number of State Court Decisions And Does Not Reveal A Split Among The States. 11

V. The Issue Presented By The Petitioner Has Already Been Settled By This Court. 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Argersinger v. Hamlin, 407 U.S. 25 (1972) 11

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 6, 13, 14

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 3, 5, 6, 7, 8, 9, 10, 14

Mathews v. Eldridge, 424 U.S. 319 (1976) 6

Ridgway v. Baker, 720 F.2d 1409 (5th Cir. 1983) .. 10

Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984) 10

Walker v. McLain, 768 F.2d 1181 (10th Cir. 1985).. 10

Wilson v. State of New Hampshire, 18 F.3d 40 (1st Cir. 1994) 7, 9

STATE CASES

Andrews v. Walton, 428 So.2d 663 (Fla. 1983)..... 12, 13

Commonwealth ex rel. Brown v. Hendrick, 283 A.2d 722 (Pa. Super. 1971)..... 11

Page

STATE CASES, Cont.

Dube v. Lopes, 481 A.2d 1293 (Conn. Super. 1984) 11

Duval v. Duval, 322 A.2d 1 (N.H. 1974) 7, 8, 9

In re Marriage of Betts, 558 N.E.2d 404 (Ill. App. 1990) 7, 13

In re Marriage of Stariha, 509 N.E.2d 1117 (Ind. App. 1987) 11

Johnson v. Johnson, 721 P.2d 290 (Kan. App. 1986) 11, 12

New Mexico ex rel. Department of Human Servs. v. Rael, 642 P.2d 1099 (N.M. 1982) 13

Padilla v. Padilla, 645 P.2d 1327 (Colo. App. 1982) 11, 12

Sheedy v. Merrimack County Superior Ct., 509 A.2d 144 (N.H. 1986) 5, 7, 8, 9, 10

Smoot v. Dingess, 236 S.E.2d 468 (W. Va. 1977) ... 11

MISCELLANEOUS

Rules of the Supreme Court of The United States, Rule 10 ..... 9, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DAVID FRIEDLINE,

Petitioner,

v.

NEW HAMPSHIRE DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF CHILD SUPPORT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Patricia Shiel-Friedline and the Petitioner, David Friedline, were divorced on or about January 5, 1993. Transcript of October 6, 1994 Show Cause Hearing ("Tr.") at 17. The same day the divorce issued, Mr. Friedline announced to his ex-wife that he had been laid off from his job as a draftsperson from his regular employer, the Sherman Crystal Company. *Id.* It appears that Sherman Crystal Company subsequently advertised open positions and offered the Petitioner his job back just five months later. Tr. at 22. However, the Petitioner refused and decided to remain self-employed as a carpenter. *Id.* For this and other reasons, Patricia Shiel-Friedline asserted to the Merrimack County

Superior Court ("Superior Court") that the Petitioner was voluntarily under-employed, was in arrears and did not make regular support payments. Tr. at 17.

At the request of the Department of Health & Human Services, Office of Child Support Enforcement Services ("Department"), the Superior Court approved a support violation on July 25, 1994, after the Petitioner failed to appear at a July 20, 1994 hearing. Notice of Appeal to the New Hampshire Supreme Court at 11. A show cause hearing was scheduled for October 6, 1994. *Id.* at 13. Sometime prior to October 6, Petitioner filed a Motion for Court-Appointed Counsel but did not serve it on Ms. Shiel-Friedline or the Department. *See* Appendix To Petition For Writ Of Certiorari To The New Hampshire Supreme Court ("the Petition") at 3. In support of his motion, Petitioner asserted, among other things, that he did not have the means to hire legal counsel and he lacked a full understanding of the law necessary to defend himself. *Id.*

On August 12, 1994, Petitioner moved to dismiss the show cause order. Motion to Deny Support Violation, Appendix to Brief in Opposition ("Appendix") at 2a. Petitioner claimed that despite an admitted arrearage, his overall arrearage was "trivial, frivolous and insignificant" and the show cause order resulted from the State's "harassing campaign of selective enforcement." *Id.* In the same motion, Petitioner moved to have Child Support Enforcement Officer Patricia Langevin and her supervisors incarcerated for two days for contempt and to pay him $500 in legal costs. *Id.*

The State objected to Petitioner's Motion, detailing the Petitioner's history of erratic payments, arrearages and non-communicativeness. Objection to Defendant's Motion, Appendix at 5a. The show cause hearing was held on October 6, 1994, at the Superior Court. Kevin Landry, attorney for the Department, appeared with Ms. Langevin because of the

Petitioner's Motion for Contempt. Tr. at 5. Despite Mr. Landry's presence, Ms. Langevin and Ms. Shiel-Friedline presented Ms. Shiel-Friedline's and the State's case, explaining Petitioner's history of inconsistent payments and his current arrearage. Tr. at 3-4.

At the hearing, Petitioner renewed his request for court-appointed counsel, citing *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). The Petition at 3. The Superior Court denied this request from the bench and Mr. Friedline proceeded with his defense. *Id.* Among the reasons Mr. Friedline gave for his failure to pay court-ordered support were his desire to change the existing custody agreement, the fact that his daughter and son were spending considerable time at his residence, that he paid half of the children's medical insurance, and that his income was "erratic". Tr. at 8-9 attached in Appendix at 11a-12a. The Petitioner also provided to the court various worksheets, which included self prepared budgets of himself and his ex-wife, the expenses associated with maintaining his vehicle, reports of payments he had received from his self-employment, draft 1992 tax records, a calendar and worksheet showingperiods when he had physical custody of either his son or daughter, and a 1993 tax return. Appellee's Brief to the New Hampshire Supreme Court, Appendix.

Ms. Shiel-Friedline informed the court that Petitioner's support payments were inconsistent, and that the inconsistent payments led to extraordinary pressures on her household finances. Tr. at 18. Attorney Kevin Landry also briefly addressed the court and informed the Superior Court that Mr. Friedline had a history of making last minute support payments to avoid enforcement efforts. Tr. at 19-20.

Based on the evidence presented at the hearing, the Superior Court issued an order finding the Petitioner in contempt for failing to timely make child support pay-

ments. *See* Appendix to the Petition at 2. The Superior Court restructured Mr. Friedline's support payment from a weekly obligation to a monthly payment of $277 commencing October 15, 1994, and ordered him to pay the arrearage of $261 in full by 1:00 p.m. the following day or a capias would issue for his arrest. *Id.* The next day, the Petitioner paid the entire arrearage of $261 from business revenue paid to him by a client.[1] He was never incarcerated.

ARGUMENT

I. Petitioner's Question Presented Is Improper For The Facts Of This Case.

Petitioner asks this Court to consider and decide whether:

> an indigent defendant, in a civil contempt action for non-payment of child support in which the defendant will be summarily incarcerated if he does not pay, [may] be denied court-appointed legal counsel?

See the Petition at i. This question assumes one crucial fact — that Petitioner was indigent. Because Petitioner did not plead indigency and the Superior Court did not find indigency, the question presented by the Petition is improper on the facts established below.

---

[1] Mr. Friedline suggests in the Petition that he had to borrow funds to make the court-ordered payment of $261. *See* Petition at 4. However, in his Motion to Reconsider filed with the Superior Court, the Petitioner asserted that "[a] payment made to [Petitioner], from a business client on the following day (Oct. 7 1994), enabled [Petitioner] to pay the ordered amount of $261.00 to avoid incarceration . . . ." *See* Motion for Reconsideration, Appendix at 18a. This statement contradicts Petitioner's assertions before this Court that the payment was made with borrowed funds.

As previously stated, Mr. Friedline requested counsel to represent him at the show cause hearing in part because Mr. Friedline did not "have the means to hire legal council [sic]." Appendix to the Petition at 3. Mr. Friedline relied on *Lassiter v. Department of Social Services*, *supra* in support of his request. *Id.* Mr. Friedline made no further assertions of indigence or inability to pay for legal counsel and his request for appointed counsel was denied by the Superior Court. The Petition at 3.

Although the Superior Court made no express inquiry into Mr. Friedline's alleged indigence, Mr. Friedline gave a number of reasons for failing to pay the previously court-ordered child support, only one of which was Petitioner's sporadic income. Appendix at 12a. Mr. Friedline also previously asserted that he did not believe that $261 was a significant arrearage; a claim an indigent would not likely make. *See* Appendix at 3a.

Based on the evidence presented at the show cause hearing, the Superior Court held Mr. Friedline in contempt of the support order. The Superior Court orderedPetitioner to pay the $261 arrearage by the following day or he would be arrested. Appendix to the Petition at 2. Because one can only be in contempt if one has the present ability to comply with the court order, *Sheedy v. Merrimack County Superior Ct.*, 509 A.2d 144, 148 (N.H. 1986), the Superior Court's ruling implicitly included the fact that Mr. Friedline had the present ability to pay but refused to do so. Significantly, and as in the past to avoid enforcement efforts, Mr. Friedline paid the $261 the following day.

By instituting a new payment plan of $277 per month beginning October 15, 1994, the Superior Court determined that Mr. Friedline had the present ability to make ongoing support payments. Likewise, by holding Mr. Friedline in contempt the Superior Court determined that he had the

present ability to pay the arrearage. Because this case does not involve an indigent defendant, who would not have the present ability to make ongoing support payments, it is not appropriate for further review.

II. The Decision Of The New Hampshire Supreme Court Is Correct And Does Not Conflict With The Decisions Of This Court.

The New Hampshire Supreme Court's decision in this case does not conflict with any decision of this Court regarding the right to appointed counsel under the Fourteenth Amendment.

A. The *Lassiter* "Presumption" Is Dicta And Not Precedential.

This Court conclusively denied indigents a per se right to appointed counsel in non-criminal proceedings in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). In *Scarpelli*, the Court held that the need for appointed counsel in probation revocation proceedingsshould be decided on a case-by-case basis. 411 U.S. at 790. This Court determined that while appointed counsel would not be necessary at the majority of revocation proceedings, fundamental fairness — the touchstone of due process - could require appointed counsel in some of these proceedings. *Id.*

The validity of the *Scarpelli* approach to appointed counsel for indigents in non-criminal matters was affirmed in *Lassiter v. Department of Social Services, supra*. In *Lassiter*, this Court held that an indigent defendant in proceedings for the termination of parental rights, did not have an absolute constitutional right to appointed counsel to satisfy due process. 452 U.S. at 32. The Court first looked to the due process factors enunciated in *Mathews v. Eldridge*, 424

U.S. 319 (1976), to determine "what due process requires." *Lassiter*, 452 U.S. at 27. The Court then, consistent with *Scarpelli,* employed a case-by-case approach to determine the necessity of appointed counsel. *Id.* at 32. Among the factors considered in determining whether appointed counsel was necessary were the complexity of the issues, the nature of the proceeding, and the attitude and ability of the person seeking counsel. *Id.*

Any pronouncement by the *Lassiter* court other than the holding recited above was dicta, is not precedential and need not be followed by New Hampshire courts. *Wilson v. State of New Hampshire*, 18 F.3d 40, 41 (1st Cir. 1994) ; *Sheedy,* 509 A.2d at 148; *In re Marriage of Betts*, 558 N.E.2d 404, 422 (Ill. App. 1990), *appeal denied*, 567 N.E.2d 328 (Ill. 1991). Petitioner's reliance on the presumed right to appointed counsel for indigents who may be incarcerated, mentioned in *Lassiter*, is misplaced.

The New Hampshire Supreme Court's decision in this case is consistent with the case-by-case approach of *Scarpelli*, *Lassiter* and existing New Hampshire law. The New Hampshire Supreme Court decisions of *Duval v. Duval*, 322 A 2d. 1 (N.H. 1974) and *Sheedy,supra*, hold that a case-by-case approach is to be used in determining whether counsel should be appointed in civil contempt cases where incarceration may result. *Sheedy,* 509 A.2d at 147-48; *Duval,* 322 A.2d at 4. In *Duval*, the New Hampshire Supreme Court held:

> due process does not require the right to counsel in every instance where the possibility of incarceration exists, but depends instead on circumstances which show that the defendant would be treated unfairly if the assistance of counsel were not provided.

Id. Sheedy confirmed the case by case approach and declined Plaintiff's invitation to accept *Lassiter* as anything more than "obiter dicta." *Sheedy*, 509 A.2d at 148. Because the New Hampshire Supreme Court in this case would not overrule controlling precedent without opinion, the only logical conclusion is that the Court followed these decisions in upholding the Superior Court's order denying Petitioner the right to appointed counsel.

B. New Hampshire Case Law And The Decision In This Case Do Not Conflict With *Lassiter*.

Even if *Lassiter* is controlling, the instant case is not inconsistent with it. In *Lassiter*, as in *Scarpelli*, the court rejected a per se right to appointed counsel for indigent defendants in non-criminal cases, favoring a case-by-case approach. *Lassiter*, 452 U.S. at 31. The *Lassiter* Court weighed a number of factors and used the *Eldridge* balancing test to hold that fundamental fairness did not require appointed counsel. *Id.* at 32-33.

Similarly, the Superior Court in this case correctly held that appointed counsel was unnecessary to afford Mr. Friedline fundamental fairness. The Superior Court transcript makes clear that the show cause hearing was not complex. Ms. Shiel-Friedline spoke on her behalf regarding her ex-husband's erratic payments. Mr. Friedline spoke on his behalf as to why he had not paid. The transcript also reflects Mr. Friedline's full ability to grasp the issues presented in the hearing. *See, e.g.*, Appendix at 11a-12a. Neither party needed or used an attorney. The only reason the Department's attorney was present was due to Mr. Friedline's Motion for Contempt against the Department. Indeed, Mr. Friedline's Motion for Contempt and other motions filed are strong evidence of his legal savvy. *See* Appendix at 2a, 16a.

This case is a clear example of why the right to appointed counsel should remain within the sound discretion of the trial judge. Mr. Friedline was, and is, an articulate, educated person fully cognizant of the importance of compliance with court-ordered support payments. Appendix at 11a-15a. Mr. Friedline's claims of lack of legal knowledge are undercut by his competently drafted and articulate pleadings and his understanding of case law relevant to this issue. *See* Appendix at 2a, 16a. Consistent with *Lassiter*, the Superior Court did not afford Mr. Friedline a per se right to appointed counsel. Mr. Friedline's dissatisfaction with the result does not merit review by this Court.

To the extent the Superior Court and/or New Hampshire Supreme Court did not undertake the balancing contemplated by *Lassiter*, *Duval* and *Sheedy*, the Courts misapplied existing case law. Nonetheless, the Courts reached the correct result. Such a case is inappropriate for further review by this court. *See* Rules of the Supreme Court of the United States ("Supreme Court Rules"), Rule 10 (1995).

III. The New Hampshire Supreme Court's Decision Does Not Reveal A Split In The Circuits.

New Hampshire law provides for a case-by-case determination of whether to appoint counsel to an indigent defendant who may face incarceration in civil contempt proceedings. *Duval, supra*; *Sheedy, supra*. The First Circuit is in agreement with this rule of law. *Wilson*, 18 F.3d at 41. Neither New Hampshire nor the First Circuit profess a per se rule against appointed counsel for indigent defendants who may be incarcerated for civil contempt.

Other circuits that have considered the issue agree that counsel should be appointed to indigents who may be incarcerated as a result of civil contempt proceedings. *Walker v.*

McLain, 768 F.2d 1181 (10th Cir. 1985) (relying on *Eldridge* balancing test, indigents entitled to appointed counsel), *cert. denied, McLain v. Walker*, 474 U.S. 1061 (1986); *Ridgway v. Baker*, 720 F.2d 1409 (5th Cir. 1983) (interpreting *Lassiter* to afford indigent defendants threatened with incarceration the right to appointed counsel); *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984) (same). These cases generally relied upon *Lassiter* for support of a virtual per se right to counsel in any proceeding in which a defendant may be jailed. Such reliance amounts to a broad extension of the *Lassiter* holding, whereas a case-by-case approach, which is employed by New Hampshire courts, is consistent with *Lassiter*.

Petitioner's assertions to the contrary, the facts of the cases cited above are not similar to the facts of Mr. Friedline's case. For example, in *Walker*, *Sevier* and *Ridgway* the contemnors were either sentenced to jail for a fixed term or actually served time behind bars. *See, e.g., Walker*, 768 F.2d at 1182 (contemnor sentenced to 90 days in jail); *Sevier*, 742 F.2d at 265 (contemnor spent 16 days in jail); *Ridgway*, 720 F.2d at 1411 (contemnor imprisoned upon finding of contempt). Petitioner here was neither sentenced to jail time nor actually incarcerated. Thus, Petitioner's assertions that his facts are "substantially identical" to those in the above cases should be discounted.

Regardless of the factual dissimilarities of this case with those relied upon by Petitioner, this case does not reveal a split in the circuits on this issue. The circuits are in agreement that counsel can be appointed to indigent civil contemnors faced with possible incarceration. The only distinction is at what point that right attaches. New Hampshire and the First Circuit would undertake a more in-depth analysis of the need for counsel to assure fundamental fairness whereas other circuits reach the issue of fundamen-

tal fairness with less of an inquiry. Because the circuits are not in disagreement over the general proposition that appointed counsel may be necessary in civil contempt cases, further review by this Court is unnecessary.

IV. The New Hampshire Supreme Court's Decision Is Consistent With A Number of State Court Decisions And Does Not Reveal A Split Among The States.

Petitioner's contentions regarding state law determinations of the right to appointed counsel in civil contempt proceedings where incarceration may result is misleading. First, Petitioner relies on a number of state superior and appellate court decisions, which do not support Petitioner's position that the instant decision conflicts with decisions of another state's court of last resort. *See* Supreme Court Rule 10(b); *see, e.g.,* the Petition at 9 *citing In re Marriage of Stariha*, 509 N.E.2d 1117 (Ind. App. 1987); *Johnson v. Johnson*, 721 P.2d 290 (Kan. App. 1986); *Dube v. Lopes*, 481 A.2d 1293 (Conn. Super. 1984); *Padilla v. Padilla*, 645 P.2d 1327 (Colo. App. 1982); *Commonwealth ex rel. Brown v. Hendrick*, 283 A.2d 722 (Pa. Super. 1971).

Petitioner also states that "courts have generally held" that a contemnor faced with incarceration has the right to appointed counsel. The Petition at 9. However, "courts" have done so for a number of reasons unrelated to the instant case. For example, some pre-*Lassiter* cases relied on criminal contempt case law for their holdings. *See, e.g., Commonwealth ex rel. Brown, supra.,* (relying on the criminal contempt case in holding a right to counsel); *Smoot v. Dingess*, 236 S.E.2d 468 (W. Va. 1977) (per se right to counsel based on state case law regarding criminal contempt and *Argersinger v. Hamlin*, 407 U.S. 25 (1972)).

Petitioner also states that "most" post-*Lassiter* decisions rely on *Lassiter* for their holdings. Petitioner then includes, in his lengthy string-citation, post-*Lassiter* decisions, which did not rely on *Lassiter* for their holdings. For example, Petitioner relies on *Padilla, supra.*, which held that an indigent civil contemnor had a right to appointed counsel pursuant to the Sixth Amendment. *See also Johnson, supra.*, (per se right to counsel pursuant to the Sixth Amendment and *Walker.*).

The most glaring misstatement of fact and law comes from Petitioner's discussion of the Florida Supreme Court's decision of *Andrews v. Walton*, 428 So.2d 663 (Fla. 1983). *Andrews* did not "eliminat[e] the possibility of incarceration for unrepresented contemnors" as Petitioner suggests. *See* the Petition at 10.

In *Andrews*, the Florida Supreme Court addressed the issue of whether an indigent parent in a civil contempt proceeding for non-payment of child support faced with incarceration was entitled to appointed counsel. *Andrews,* 428 So.2d at 664. In answering this question, the Court stated that it had previously determined that due process was incorporated into the determination of whether a person could be incarcerated for non-payment of child support. *Id.* at 666. The Court stated:

> to satisfy due process, a person could not be adjudicated guilty of failing to pay [support] and sentenced to imprisonment conditional upon payment unless the trial court finds that the person (1) has the ability to make payments; and (2) willfully refuses to pay. Consequently, . . . an indigent parent cannot be imprisoned for failure to pay child support because, upon a showing of indigency, the trial court cannot make the essential finding that the indigent parent has the ability to pay.

Id. The court then found that because a parent who is unable to pay would not be subject to incarceration, due process did not require appointment of counsel. *Id.* Thus, contrary to the Petitioner's statement of the law, the Florida court actually held that indigent persons, not unrepresented contemnors, would not be subject to incarceration because the indigent could not be found in contempt. *Andrews*, 428 So.2d 666.

In the case at bar, Mr. Friedline was held in contempt and was ordered to commence support payments on a monthly basis. Therefore, as previously discussed, Mr. Friedline's suggestion that he did not have the means to hire counsel was rejected as establishing indigency.

Respondent agrees that there are a number of solutions to the issue of whether an indigent is entitled to appointed counsel in civil contempt proceedings that may result in imprisonment. However, the variety of approaches does not equate to a split among the states. Some solutions are in accord with New Hampshire law. *See, e.g., In re Marriage of Betts*, 558 N.E.2d 404 (1990); *New Mexico ex rel. Department of Human Servs. v. Rael*, 642 P.2d 1099 (N.M. 1982). In addition, Mr. Friedline's case, and New Hampshire's case-by-case approach to the issue, are not necessarily inconsistent with other states' decisions. Because due process is a flexible concept, *Scarpelli*, 411 U.S. at 788, various approaches to the issue of an indigent civil contemnor's right to appointed counsel can satisfy fundamental fairness — the cornerstone of due process.

V. The Issue Presented By The Petitioner Has Already Been Settled By This Court.

This Court has already decided the question at issue in this proceeding. That is, indigent defendants in non-crimi-

nal proceedings may be entitled to appointed counsel on a case-by-case basis. *Lassiter*, 452 U.S. at 32; *Scarpelli*, 411 U.S. at 790.

The factors considered in *Lassiter*, i.e., the complexity and nature of the proceeding, and the ability of the defendant are equally applicable to civil contempt matters involving non-payment of child support. Furthermore, an indigent defendant, if truly indigent, need not fear incarceration because incarceration can only result if the defendant is found able to pay and willfully refuses to do so.

Lassiter does not advocate a per se right to appointed counsel. 452 U.S. at 32. States that wish to give that benefit to defendants in proceedings for civil contempt are free to do so. However, states that choose to abide by a case-by-case approach do not thus violate the due process rights of a defendant.

Because this Court has previously decided the issue of the right to appointed counsel for indigent defendants in non-criminal proceedings the Court need not do so again.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

NEW HAMPSHIRE
DEPT. OF HEALTH & HUMAN SERVICES,
OFFICE OF CHILD SUPPORT
ENFORCEMENT SERVICES

By its attorneys,

JEFFREY R. HOWARD
Attorney General
STEPHEN J. JUDGE*
Senior Assistant Attorney General
JENNIFER BROOKS GAVILONDO
Attorney
CIVIL BUREAU
New Hampshire Department of Justice
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3658

* *Counsel of Record*

No. 95-184

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DAVID FRIEDLINE,

Petitioner,

v.

NEW HAMPSHIRE DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF CHILD SUPPORT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

APPENDIX

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. AUGUST TERM, 1994

SUPERIOR COURT

PATRICIA SHIEL-FRIEDLINE

V.

DAVID FRIEDLINE

90-M-735

MOTION TO DENY SUPPORT VIOLATION - SHOW CAUSE HEARING

AND

MOTION OF CONTEMPT

NOW COMES the defendant, and respectfully Moves that this Honorable Court deny the Division of Human Services - Office of Child Support Enforcement's Support Violation and request for a show Cause Hearing, and to find Patricia Langevin - Office of Child Support Enforcement (OCSE), and her direct supervisor(s) in Contempt of Court.

AS GROUNDS for these motions, the defendant states as follows:

1. The defendant has received a Support Violation from OCSE alleging that he is $428 in arrears of July 25, 1994.

2. That the defendant is entitled, due to the terms of his final divorce decree to a 50% reduction in child support during his children's' 5 week summer stay at his residence, and further that both the plaintiff and the OCSE is aware of this provision, and that this provision results in a further credit of $160.

3. That, applying the above credit, using the OCSE's accounting methods, the defendants arrearage on July 25, 1994 is $268, and that this is amount less than one month's obligation.

4. That the defendant mailed a routine Child Support payment of $79 on July 16, 1994, and that this payment may or may not credited to his account prior to the issuance of said support violation.

5. That the defendant has made further routine and predictable support payments totaling $158 on August 4, 1994, and that his arrearage on that date is between $109 and $175, and that he continues his best efforts to keep his payments as regular as possible, given the erratic nature of his means of employment.

6. That this amount of arrearage is trivial, frivolous, and insignificant, overstated, and subject to vague bookkeeping practices of the OCSE regarding posting dates of obligations and payments, and time lags of the U.S. Postal Service, and is both a deliberate misstatement of fact, and a harassment of the defendant.

7. That the OCSE is engaged in a pattern of selective enforcement, in violation of equal protection clauses of both New Hampshire and the United States.

WHEREFORE, the defendant respectfully requests this Honorable Court:

1. Order the OCSE to vacate or deny said Support Violaton.

2. Find Patricia Langevin of the OCSE, and her direct supervisor(s), in Contempt of Court for filing a frivolous action.

3. Find Patricia Langevin of the OCSE, and her direct supervisor(s), in Contempt of Court for deceit and deliberate misstatement of fact.

4. Order that Patricia Langevin of the OCSE, and her direct supervisor(s), be incarcerated for two days.

5. Order the OCSE to cease the harassment of the defendant, and of others, of names unknown, which may be similarly situated.

6. Order the OCSE to prioritize their efforts according to the severity of the arrearage.

7. Order the OCSE to pay the defendant $500 in legal costs.

8. Grant such and other relief as is just.

Respectfully submitted,

David Friedline, Pro Se

Date: August 12, 1994

I certify that a copy of this Motion has this day been forwarded to to Patricia Langevin, OCSE.

David Friedline, Pro Se

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

NO. 90-M-735

Patricia Shiel-Friedline

V.

David Friedline

OBJECTION TO DEFENDANT'S MOTION TO DENY SUPPORT VIOLATION AND MOTION OF CONTEMPT

NOW COMES The State of New Hampshire, Division of Human Services, of 6 Hazen Drive, Concord, NH 03301, plaintiff, who states as follows:

1. That the defendant is under a April 13, 1993 Court Order to pay child support in the weekly amount of $64.00;

2. That the defendant has filed a Motion to Deny Support Violation and Motion for Contempt, in which he seeks to vacate or deny a support obligation and also to find Patricia Langevin, Office of Child Support Enforcement, and her immediate supervisor, in contempt of court;

3. That since Ms. Langevin became involved in this matter, in November, 1993, the defendant has not made "routine and predictable support payments", as he has alleged, but, rather has a history on irregular payments with a continuous arrearage amount (the defendant has an average weekly arrearage of $348.00 since January 25, 1994);

4. That as of January 25, 1994 the defendant was in arrears of $384.00;

5. That the defendant did make payments, but never in accordance with the court order, and as of May 10, 1994 he was arrears of $475.00;

6. That between January 25, and May 10, 1994 his smallest arrearage totaled $211.00;

7. That after a May 10, 1994 payment the defendant made no further payments until he sent a payment of $450.00, which was credited on July 19, 1994;

8. That this $450.00 payment was only made after the Division took steps to enforce the support obligation;

9. That by letter dated July 7, 1994 the Division had informed the defendant that he was in arrears of $750.00 and that a meeting had been scheduled for July 18, 1994, for him and the Division, to discuss arrangements to clear up the arrears;

10. That the letter also contained notice that if the defendant did not attend the meeting that the Division would request that the court schedule a show cause hearing (see attached letter marked Exhibit A);

11. That the defendant did not appear, although he did send the payment of $450.00, discussed above, which reduced his arrears to $349.00;

12. That this payment was the first made by the defendant since May 10, 1994;

13. That the Division then requested a show cause hearing, based on the defendant'S failure to attend the scheduled meeting and his continued noncompliance with the support order (see attached letter marked Exhibit B);

14. That the defendant is allowed a 50% reduction in his support obligation for the five week period in the summer that he has custodial visitation with the children;

16. That by letter dated August 10, 1994, received by the Division on August 11, 1994, the defendant requested that he be credited with this reduction;

17. That upon receipt of this request, the Division verified the reduction language in the Order and by letter dated August 17, 1994, informed the defendant that he would be credited $160.00;

18. That the following day, August 18, 1994, the Division received the defendant' Motion, although it is dated August 12, 1994;

19. That with the credit of $160.00 the defendant remains in arrears in the amount of $208.00, as of August 22, 1994;

20. That a review of the defendant's payment history does not show payments as being "routine and predictable";

21. That during the two month period in which NO PAYMENTS WERE MADE (emphasis added), the defendant did not contact the Division as to any reason why he was ignoring his obligation and was continuing in contempt of the support order;

22. That the plaintiff strongly objects to the defendant's rationalization that his arrearage is "trivial, frivolous, and insignificant, [and] overstated", but would wish the Court to recognize that every dollar that the defendant fails to provide in accordance with the Court Order is one dollar less that she has to provide for the parties" children;

23. That it is the defendant who is in contempt of this court, and the defendant who has filed a frivolous pleading seeking a cessation of collection efforts, on behalf of the plaintiff, for an arrearage that he admits to owing;

24. That the plaintiff, Patricia Shiel-Friedline, does not receive public assistance and must rely on the court ordered support, along with her earnings, in order to provide for the parties' two children;

WHEREFORE, the plaintiff requests that this Court:

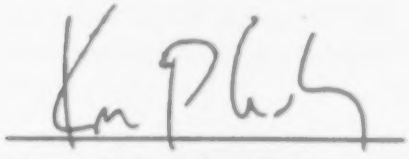
A. Deny the defendant's Motion To Deny Support Violation-Show Cause Hearing And Motion of Contempt;

B. Find the defendant in contempt for his failure to abide by the court order on support;

C. Allow the Division to go forward with the Show Cause Hearing, scheduled for October 6, 1994; and

D. Award such further relief as may be just.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE
By its attorney



Kevin P. Landry, Esq.
Attorney for the State of NH
Division of Human Services
Office of Child Support
6 Hazen Drive
Concord, NH 03301
(603) 271-4812

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Objection has been mailed this 29th day of August, 1994 to the defendant at 406A Old Sutton Rd. Bradford, NH 03221.

Master Recommends: Motion Approved. Order in Accordance.

_____

Approved this _____, day of _____, 19__

_____, Presiding Justice

COPY

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY SUPERIOR COURT

PATRICIA SHIEL-FRIEDLINE)
)
V.) Docket No: 90-M-735
)
DAVID FRIEDLINE)

SHOW CAUSE HEARING

Before: Honorable Kathleen A. McGuire
Presiding Justice, held at
Concord, New Hampshire, on
Thursday, October 6, 1994

* * *

APPEARANCES:

For the Plaintiff: Patricia Langevin
Kevin Landry
Support Enforcement Officers

For the Defendant: David Friedline
Pro Se

Court Reporter: Michelle A. H. McGirr
CSR/RPR
Official Court Reporter

* * *

MR. LANDRY: 261.

MR. FRIEDLINE: -- 261. Would that include -- or maybe it's not appropriate to ask you questions right now.

THE COURT: Go ahead. Just tell me your side of the story, please.

MR. FRIEDLINE: Well, a) back in May of this year, my older child, Lee, made a request that she change her residence for purposes of where she goes to school and where she spends the majority of her time and this changed arrangement was verbally agreed to as early as, I believe, late May, 1994. Lee is registered at Kearsarge High School and visits her mother every other weekend from 5:30 P.M. until Sunday at 5:30 P.M. -- excuse me -- 5:30 P.M. to Sunday 5:30 P.M.

Defendant here has attempted a mediation of the issues of visitation and custody and child support, but the plaintiff insists that Lee's living at my house is only an extension of visitation

and she will not mediate. I have absorbed most of the expenses for school, clothes, supplies -- and supplies in addition to non-normal ongoing costs of supporting her. I do know though that I must file a formal modification to change my support obligation, but I do not really want to have another go-round in court, although it appears I must do so now; and I have prepared a motion to deal with these issues, which I will file today. I don't know if it's appropriate to file it right here before you or not.

THE COURT: You give it to the clerks office before you go.

MR. FRIEDLINE: That's what I will do, Your Honor.

I have my son living at my house about 135 days a year and I also must keep a reserve for his direct needs when he's at my house. My income has been erratic due to the economy. I'm an architectural draftsman. The building industry has

been obligated to pay $16,710 in child support and I believe my current arrearage to be somewhere between 100 and 250. I'm not completely sure. I've also calculated the debt is 99.1 percent of the total support I've ever been obligated to pay.

In addition, I pay half the childrens' medical insurance; and for the past two years that's maybe another thousand dollars each year; and I also -- when I say that I believe the Office of Child Support has been harassing me, I point to state-wide averages that I see published in numbers that say only 60 percent of all child support is paid. So the question comes into my head, "Why me?"

I have another worksheet that is sort of -- because I have not filed this year's tax return yet, I did sort of a quick accounting of this year's income and noted when I received checks. That's -- do you have this sheet here? I think you'll see that the first chunk of income I received

would be after him every week until these arrears were paid in full; and I just wanted the Court to be clear, because I got a feeling he'll be filing this motion again and I want the record clear as to -- we're asking his motion of contempt be denied and I guess we'll deal with any future motion that he probably will be working on soon.

Thank you, Your Honor.

THE COURT: Do you want to say anything more?

MR. FRIEDLINE: Yes. If you review the previous order that I had, you'll find that I was not found in contempt of court for non-payment of child support. There was a side issue involving a loan that goes back to the -- I think it was still going -- a loan for about $200 that goes back to the marriage that was -- that it was ruled that I was in contempt on, but the ruling does not speak of my being -- the order does not speak of my being in contempt of court for non-payment of child support. It basically

awarded the modification and recalculated an arrearage that was set out of the current order. Do you need a copy of that, Your Honor?

THE COURT: No.

MR. FRIEDLINE: I would like also to reply, Your Honor, to my employment.

I was laid off in January of '93 and of the staff -- there was a six-person office and four of those people were basically off duty for a period of time. I was offered return work in May or June of that year, but I also -- at that point I had pretty much -- and I also collected unemployment from January through March of '93. I was offered reemployment this year with Sherman Crystal in June of '93. I refused based on other work that I had working as a carpenter and other commitments that I had made; and my ex-wife spoke to the fact that I, during the marriage, had for many years been self employed so self-employment was not new to

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. OCTOBER TERM, 1994

SUPERIOR COURT

PATRICIA SHIEL-FRIEDLINE

V.

DAVID FRIEDLINE

90-M-735

MOTION TO RECONSIDER

NOW COMES the defendant, and Moves that this Court RECONSIDER its order dated October 6, 1994.

AS GROUNDS for this motion, the defendant states as follows:

1. The defendant's request for appointed legal council was denied by the court, in direct contradiction with a US. Supreme Court ruling (Lassiter v. Department of Social Services of North Carolina; 435 US 18, 1980) which held that:

> "With regard to what the "fundamental fairness" requirement of the Due Process Clause means concerning the right to appointed council, there is a presumption that an indigent litigant has a right to appointed council only when, if he loses, he may be deprived of his physical liberty."

2. The court went on to explain that an indigent litigant has:

> "...a right to appointed council even though those proceedings may be styled "civil" and not "criminal."

3. The Supreme Court of North Carolina, in interpreting the Lassiter decision in the context of a child support violation case (McBride v. Mc. Bride, S.E. 2d 14, N.C. 1993), has ruled:

> "...we conclude that the trial court erred by ordering that the defendant be incarcerated for civil contempt without the benefit of appointed council to represent him at the hearing resulting in his incarceration."
>
> "...the federal circuit courts of appeal which have addressed the issue now before us appear to have unanimously concluded that due process requires that an indigent defendant in a civil contempt proceeding not be incarcerated absent the assistance of appointed council."

4. The defendant does not have the financial means to hire an attorney.

5. The state has, at the same time, provided free legal representation to the plaintiff, creating a violation of the Equal protection provisions of both the New Hampshire and United States Constitutions.

6. The defendant's maintains that, absent legal council, he is not competent to represent himself.

7. The defendant maintains that he was not able to, due to his lack of knowledge of court proceeding, present the following facts:

a. Defendant had an overdrawn balance in his only bank account on the day of the hearing, and had no ability to pay.

b. The court made no inquiry into the defendant's ability to pay.

c. The defendant had not ample opportunity to analyze the record of payments presented at the hearing by the state's attorney, Kevin Landry, and has since discovered that a payment of $158.00 was not credited to his account, and that defendant believes that this payment was known to the state's attorney at the time of the hearing.

d. That inclusion of the above payment would have reduced the current arrearage, on the date of the hearing, to $103.00.

e. A payment made to the defendant, from a business client on the following day (Oct. 7, 1994), enabled the defendant to pay the ordered amount of $261.00 to avoid incarceration, forcing the defendant to be $158.00 in SURPLUS in his child support payments to avoid incarceration.

f. The court heard a statement, not under oath, from the plaintiff, stating her consideration of signing up for welfare, and of her personal stress, which made no mention of:

i. her new 1994 Ford automobile.

ii. her steady $17,000 per year job with medical/dental/paid vacation & holiday benefits.

iii. the fact that the parties older child, Leigh Friedline, lives primarily in the defendant's home, and that he bears most of the direct costs associated with her meals, clothing, housing, laundry, and schooling, while at the same time paying child support to the plaintiff for Leigh Friedline's support.

iv. the possibility that plaintiff's stated personal stress is not of the defendant's making.

8. The trial judge cut off the hearing while the defendant was trying to gather his thoughts to respond to the hearsay presented by the plaintiff and by the state's attorney, Kevin Landry.

9. The arrearage in question, whether $261.00 or $103.00, is less than one month's total support, and is trivial given the defendants good record of making child support payments to the best of his ability.

10. The defendant's direct expense and emotional involvement in his children's lives were not considered.

11. The defendant can only conclude that this court is fundamentally biased against this father, and against others, of names unknown, who may be similarly situated.

WHEREFORE, the defendant REQUESTS this court:

1. Declare the October 6, 1994 hearing illegal and void, due to the court's denial of competent legal council for the defendant.

2. Declare that the defendant is not in contempt of court.

3. Schedule a new hearing on all the issues scheduled on Oct. 6, 1994, with the proper due process safeguards for the defendant, including the appointment of competent legal council.

4. Order that all support obligors in New Hampshire with hearings to "show cause why you (they) should not be held in contempt of court and incarcerated", be provided with court appointed legal council, as required by the US Supreme Court in the Lassiter decision.

5. Immediately release all support obligors in New Hampshire, which are presently or have been have been incarcerated illegally, as defined by the US Supreme Court in the Lassiter decision, and pay them appropriate damages for their loss of liberty.

6. Find that the Superior Court of New Hampshire has become party to the "child support hysteria" by its acceptance of funding from the NH Division of Human Services, Office of Child Support Enforcement, and is thus in a conflict of interest which renders it incapable of conducting a fair hearing in any case in which the Division of Human Services is involved.

7. Find that, by the Superior Court's own rulings, that 97% of support obligors in New Hampshire are male, and that it is clear from this record that the New Hampshire Superior Court is among the most gender biased institutions in the entire world.

Respectfully submitted,

David Friedline, Pro Se

Date: October 14, 1994

I certify that copies of this Motion has this day been forwarded to Patricia Langevin and Kevin Laundry, attorney for the Office of Child Support Enforcement.

David Friedline, Pro Se